

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JERRY TAYLOR,

Plaintiff-Appellant,

v

HOME DEPOT USA, INC.,

Defendant-Appellee,

and

KIMCO CORPORATION,

Defendant.

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UNPUBLISHED

April 4, 2006

No. 266105

Kent Circuit Court

LC No. 04-002628-NO

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(10) in this premises liability slip and fall case. The circuit court concluded that the open and obvious doctrine barred plaintiff's claim.<sup>1</sup> We reverse.

I

On the afternoon of May 15, 2003, plaintiff was purchasing wood molding at a Home Depot store where he had shopped several times before. Plaintiff and a Home Depot sales associate assigned to the lumber department, Robert Becker, were in the area of the 1' x 4' boards, and Becker was cutting or about to cut boards for plaintiff at a saw located down the aisle from the 1' x 4's. Both plaintiff and Becker carried lumber to the saw. Plaintiff testified that he believed that it was on a trip back from the saw that he slipped and fell. Plaintiff landed on his back and sustained serious injuries. When plaintiff got up from the fall, he observed water underneath him, and his foot mark through the water. Plaintiff testified that as he was falling, he

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<sup>1</sup> Former defendant Kimco Corporation, which performed cleaning and maintenance at the Home Depot store in question, was granted summary disposition earlier, and plaintiff did not appeal from that order.

saw a piece of black plastic go spinning down the floor, and that there were staples protruding from it. Plaintiff's complaint alleged that the water and/or plastic piece caused him to slip and fall.

After the close of discovery, defendant moved for summary disposition, asserting that it had no notice of the allegedly dangerous condition and that the open and obvious doctrine barred plaintiff's claim. The circuit court found that defendant lacked notice regarding the black plastic piece, had notice of the water, but granted defendant summary disposition under MCR 2.116(C)(10) concluding that the alleged condition was open and obvious.

#### A

Plaintiff makes two inter-related arguments on appeal. Plaintiff asserts that the circuit court misapplied the open and obvious doctrine by equating an open condition with an obvious one, and by failing to apply an objective, rather than subjective, standard. Plaintiff also contends that had the objective standard been applied, the court would have determined that a question of fact remained whether the water on the aisle floor was observable on casual inspection. We agree.

This Court reviews the circuit court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. The trial court must consider documentary evidence submitted by the parties in the light most favorable to the non-movant. Summary disposition is warranted where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Generally, a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. However, this duty does not extend to dangers that are open and obvious, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. Special aspects are those that 'give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ' Neither a common condition nor an avoidable condition is uniquely dangerous. [*Kenny v Kaatz Funeral Home, Inc.*, 264 Mich App 99; 689 NW2d 737 (2004) (Griffin, J., dissenting), reversed in 472 Mich 929; 697 NW2d 526 (2005), for reasons stated in Judge Griffin's dissenting opinion, which the Supreme Court adopted. Citations omitted.]

#### B

Plaintiff submitted documentary evidence below including a Home Depot Customer Incident Statement, completed by Home Depot manager Jerry Vodry at 3:50 p.m. on the date of the incident (5-15-03), stating that "Bob" (referring to sales associate Robert Becker) witnessed plaintiff's fall. Under the section of the Incident Statement called "Describe What Occurred," Vodry hand-wrote:

Slipped on water in the back aisle by 1 x 4 – material and piece of plastic.

Customer said he slipped and fell on his back. Said he felt alright he hoped he could walk it off.

Home Depot sales associate Becker testified that he was at the saw when plaintiff fell, that he heard plaintiff drop the lumber he was carrying, and saw him lying on the aisle floor. Becker testified that after plaintiff fell, he noticed “something” on the floor, but could not recall precisely what it was. Becker testified that he had not observed whatever was on the floor before plaintiff fell, even though he had been assigned to the lumber department all day, and had swept up several times.

Plaintiff testified that it was raining on the day of the incident when he went to Home Depot, and that he was wearing three-month-old Timberline mountain climbing boots that had “awesome” tread. He testified that the spot where he fell in the lumber department was in close proximity to the 1’ x 4’s, and that the floor was cement. Plaintiff testified that he did not see anything on the aisle floor before he fell, but that after he fell he noticed water on the aisle floor, and after he fell he also noticed the path mark of his shoe through the water. After that, “[Becker] went over there and took his foot and swished the water back and forth and told the manager [Vodry]. He went back to the water spot. I could see where he swished the water around to spread it.” Plaintiff also testified:

*Q.* All right. Do you remember how wide or how big this you described water being, and was it a puddle?

*A.* No, it wasn’t very big. It was maybe like this, you know. I mean, I honestly don’t – I didn’t measure it. All I know is the guy [Becker] went over there and took his foot and swished the water back and forth and told the manager [Vodry]. He went back to the water spot. I could see where he swished the water around to spread it. He didn’t go get a mop or nothing [sic]. He took his shoes and spread it around so it wasn’t look (sic) a huge puddle. It was just enough water, you know, on cement. I didn’t, I don’t know.

*Q.* Okay. As you’re sitting there you didn’t notice this water?

*A.* I did not notice the water.

*Q.* At some point after you stood up you noticed the water?

*A.* Right.

\* \* \*

*Q.* As you’re standing there after the fall when you looked down you saw water; true?

*A.* After I got up, yes, I did.

Q. Okay. And it appeared to be some at least standing water, because you actually watched somebody moving their foot moving water about?

A. Yes, I did see him move his foot back and forth.

Q. Correct?

A. Yes.

Q. So, it was open enough that you could see that it was water; true?

A. Yep.

Q. Nothing hidden about it; true?

A. No, other than I didn't see it.

Q. You didn't see it before, you saw it after; correct?

A. Correct.

Q. Okay.

A. That cement is gray, the water is clear. I didn't see any glaring off the water, so whether it was invisible I don't know. All I know is I didn't see it.

\* \* \*

Q. By the way, when you got up off the ground and you saw that water that was six feet below you on the pavement, did you happen to notice if it appeared the water had been displaced or like a tail like the water had been kicked or?

A. Yeah.

\* \* \*

Q. This is before the guy even came down and swished his own foot?

A. I can see where I went through it, yeah, I can see where I went through it, but I don't know about splatters. I can see where the foot went through it.

Q. You could see the actual path?

A. Yeah, you could see the actual path.

Q. That was clear to you from just standing erect; true?

A. Yeah. True.

Q. And this piece of eight-and-a-half by eleven notebook paper was the puddle that when you first saw it before the guy came down and kicked his foot around in it, was the puddle bigger or smaller than this piece of paper?

A. I would say it's probably about that size when I went through it.

Q. About eight-and-a-half by eleven?

A. Has the skid mark and everything going through. I would say it's close to that somewhere in there.

Plaintiff also testified that Home Depot manager Vodry took him around the lumber department after his fall and showed him where the store roof leaked in that general area. Plaintiff testified that while Vodry was taking him around, he did not see water dripping from the roof, but saw water on the floor at the locations Vodry showed him.

Plaintiff also testified that as he was falling he noticed a "square piece of plastic with staples in" it, that was black and probably measured about 2 ½" square.<sup>2</sup>

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<sup>2</sup> Regarding the square piece of plastic, plaintiff testified:

Q. I want to return to the floor where you fell. You said that you noticed a piece of black plastic, approximately two-and-a-half inches by two-and-a-half inches with at least a staple in it. Did you make any determination as to whether or not it was the plastic that caused to you fall?

A. When I fell, I seen [sic] something flicking through the floor, and talking to those guys, I went over there to see what it was – an assumption.

Q. That's what it was, okay. So you kind of saw that kind of fly up in the air?

A. Right. \* \* \*

A. I seen [sic] a little square piece of plastic when I slipped. I landed on this right elbow, came down like this. The only thing I seen [sic] was a piece of plastic flipping across the floor, and that's it.

\* \* \*

Q. This piece of plastic, what color was it?

A. Black.

\* \* \*

(continued...)

C

We conclude that the circuit court did not properly analyze whether an objective reasonable person would have noticed the water on casual inspection (before his/her fall), and instead concluded that if plaintiff noticed the hazard after the fall, it must have been open and obvious. The documentary evidence submitted below was sufficient to raise a genuine issue of fact whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the alleged condition (water on the cement floor of the aisle) upon casual inspection.

The record is clear that neither the sales associate that assisted plaintiff with buying lumber, Robert Becker, nor plaintiff observed the water before plaintiff's fall. Becker testified that he had been in and around the lumber department working and cleaning up all day that day, and did not notice any water, and that plaintiff's fall occurred as he was about to leave work around 3:00 p.m. From plaintiff's testimony, Vodry's incident report, and Becker's testimony, a question of fact remained whether an average person with ordinary intelligence would have discovered the alleged condition on casual inspection.

We do not agree with defendant that all the evidence points to the water being visible "from six feet away." Defendant is referring to plaintiff's deposition testimony that he only saw the water after he fell and when he stood up from the fall. Plaintiff testified that he is over 6' tall, so defendant asserts that the water was clearly visible from six feet away. Defendant is equating plaintiff's testimony with testimony that the water was visible six feet away (e.g., to a shopper coming down the aisle), when in fact, a reasonable jury could conclude from the evidence presented below that both plaintiff and Becker had walked up and down the aisle several times before plaintiff's fall and not observed it because it was not observable upon casual inspection, and that the water was more visible after plaintiff disturbed it with his fall than before.

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(...continued)

*Q.* You said that you saw what you described to be this size, using Exhibit Number 2, some type of dark color, thought black plastic. I'm trying to find out when the first (sic) time you saw that item.

*A.* Spinning across the floor.

*Q.* And where were you when you saw it slipping across the floor?

*A.* I was laying backwards and it was going this way.

\* \* \*

*Q.* You were on the ground, you've already fallen?

*A.* I have already fallen.

We reverse the circuit court's grant of summary disposition to defendant and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Helene N. White